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84-1290

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM,
1984

NO. D-464
****

RICHARD BYRNE,
PETITIONER

vs.

THE MASS TRANSIT ADMINISTRATION
AND
AMALGAMATED TRANSIT WORKERS UNION,
DIVISION 1300, AFL-CIO

****

On Writ of Certiorari to the
COURT OF APPEALS OF MARYLAND

****

PETITION FOR A WRIT OF CERTIORARI

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE FEDERALLY PROTECTED RIGHT OF UNION MEMBERS TO BE FAIRLY REPRESENTED BY THEIR UNION, WHICH AROSE OUT OF CASES INTERPRETING THE NATIONAL LABOR RELATIONS ACT, WHICH WAS PASSED PURSUANT TO THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION, CAN BE TAKEN AWAY BY STATE TAKE-OVER OF THE PRIVATELY OWNED TRANSIT COMPANY?

II. WHETHER THE URBAN MASS TRANSIT ACT OF 1964 INSURED THAT THE COLLECTIVE BARGAINING RIGHTS OF THE WORKERS OF PRIVATELY OWNED TRANSIT COMPANIES HAD TO BE PRESERVED NOTWITHSTANDING THE TAKE-OVER OF THE TRANSIT SYSTEM BY THE STATE?

III. WHETHER A STATE WHICH HAS RECOGNIZED THE RIGHT OF FAIR REPRESENTATION CAN RESTRICT THE USE OF THIS FEDERALLY PROTECTIVE RIGHT BY PERMITTING AN AGGRIEVED WORKER TO SUE HIS UNION ONLY AND NOT HIS EMPLOYER

STATEMENT OF PARTIES TO THESE PROCEEDINGS

The Petitioner, Richard Byrne, was the plaintiff in the Circuit Court for Baltimore City of the State of Maryland. Petitioner Byrne was the Appellant before the Court of Special Appeals of Maryland. The Mass Transit Administration and Amalgamated Transit Workers Union, Division 1300, AFL-CIO, were the defendants in the Circuit Court for Baltimore City, of the State of Maryland. Both the Mass Transit Administration and the Amalgamated Transit Workers Union, Division 1300, AFL-CIO, were the Appellees before The Court of Special Appeals of Maryland.

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LOWER COURT OPINIONS

The Ruling of the Circuit Court of Baltimore City of the State of Maryland is unpublished. The Opinion of The Court of Special Appeals of Maryland appears at 473 A2d. 956 (Md. App. 1984) and the order of The Court of Appeals of Maryland is found in the Appendix.

JURISDICTION OF THIS COURT

The jurisdiction of This Court is sought pursuant to 28 U.S.C. 1257(3).

STATEMENT OF THE CASE

This case is an action for breach of Union-Employer Contract and for unfair representation filed on August 17, 1983, under Section 301 of the L.M.R.A. Plaintiff Byrne alleged that defendant Mass Transit Administration breached its collective bargaining agreement resulting in discharge of the plaintiff from his job. The complaint alleged that defendant Amalgamated Transit Workers Union, Division 1300, AFL-CIO, breached its duty of fair representation by failing to properly process the plaintiff's grievance at each step of the Grievance Proceeding up to and including the Aribtration Proceeding on July 15th and 21st, 1982. On May 31, 1983, a judgment was entered in The Circuit Court for Baltimore City, sustaining a Demurrer by the Amalgamated Transit Workers Union, Division 1300, AFL-CIO, and for the

granting of Mass Transit Administration's Motion Raising Preliminary Objection and For Summary Judgment. The Demurrer was sustained without leave to amend and the Motion for Summary Judgment was granted. The judgment of The Circuit Court for Baltimore City, in effect, denied plaintiff his right to bring a fair representation suit against his Union for failure to provide him with that degree of fair representation that was required to preserve his collective bargaining rights in the arbitral proceeding and, because of that failure on the part of his Union, to be discharged from his employment. Furthermore, the judgment of The Circuit Court of Baltimore City foreclosed plaintiff's action against his former employer for wrongful discharge and breach of the collective bargaining contract.

Plaintiff appealed this judgment of the Circuit Court of Baltimore City to the Court of Special Appeals of Maryland on June 16, 1983. On April 12, 1984, the Court of Special Appeals of Maryland rendered an Opinion that stated that the L.M.R.A., 29 U.S.C. 185(a) did not permit employees to maintain an action against their employer where the union allegedly failed to represent the employee in good faith. Therefore, the Appeals Court granted the employer Mass Transit Administration's Motion for Summary Judgment. However, they did allow appellant Byrne to pursue his fair representation action in the State Court. Furthermore, they stated that the duty of fair representation did not arise under the L.M.R.A. but rather as a private cause of action under State Law for breach of contract.

Appellant Byrne then filed a Petition for Writ of Certiorari in the Court of

Maryland on May 29, 1984. The petition was denied by the Court of Appeals on September 14, 1984.

It is the opinion of the Court of Special Appeals of Maryland and the Order of the Court of Appeals of Maryland which Your Petitioner now seeks to bring before This Honorable Court for its review. The time for filing the Petition for Writ of Certiorari was extended until February 11, 1985 (Appendix).

ARGUMENT

Congress may regulate and preempt all aspects of labor relations as long as they in someway affect Interstate Commerce. See Section 2(7) of the Wagner Labor Act which defines "affecting commerce" to mean "in commerce, or burdening, or obstructing commerce or the free flow of commerce". National Labor Relations Board vs. Jones and Laughlin Steel Corp., 301 U.S. 1 57 S.Ct. 615 (1937). Interstate Commerce may even extend to some activities that appear to be purely intrastate in character.

> "Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect the commerce from burdens or obstructions, Congress cannot be denied the power to exercise that control." N.L.R.B. v. Jones and Laughlin Steel Corp., 57 S.Ct. 624.

In fact, under the affectation doctrine set forth in the case of Wickard v. Filburn, 63 S.Ct. 82 (1942), it is difficult to imagine any situation where Congress could not regulate if it chose so to do.

Pursuant to this power to regulate labor relations, Congress enacted the National Labor Relations Act. Various Supreme Court cases interpreting the National Labor Relations Act of 1947, created the doctrine of the duty of fair representation. These cases held that the duty of fair representation is a part of the Collective Bargaining rights, because it is the mechanism that insures that the unions impartially enforce those rights on behalf of its members. This was the reason underlying the two seminal Supreme Court cases which applied the duty of fair representation. Vaca v. Sipes, 386 U.S. 171, 87 S.Ct. 903 (1967) and Humphrey v. Moore, 375 U.S. 335, 84 S.Ct 363 (1964).

"Under this doctrine, the exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty and to avoid arbitrary conduct. Humphrey v. Moore, 375 U.S. at 342 845 Ct. at 367", Vaca v. Sipes, 87 S.Ct. 903, 910.

"It is now well established that as the exclusive bargaining representative of the employees in Owens' bargaining unit, the Union had a statutory duty fairly to represent all those employees, both in collective bargaining with Swift, see Ford Motor Co v. Huffman, 345 U.S. 330, 73 S. Ct. 681, 97 L.Ed. 1048; Syres v. Oil Worker International Union, 350 U.S. 892, 76 S.Ct. 152, 100 L.Ed. 785 and in its enforcement of the resulting Collective Bargaining Agreement, see Humphrey v. Moore, 375 U.S. 335, 84 S.Ct. 363, 11 L.Ed. 2d 370".

Vaca v. Sipes, 87 S.Ct. 903, 909-10 (1967)

However, it was the holding of the Court of Special Appeals of Maryland in the case of Byrne v. Mass Transit Administration, et al., Md. App., 473 A.2d 956 (1984) that the duty of fair representation did not arise under the L.M.R.A., but rather as a private cause of action under State Law for breach of contract. By so doing, the Court of Special Appeals of Maryland was attempting to evade the constitutional question that is created by its impairment of petitioner's right of fair representation that petitioner fully enjoyed when his employer was a privately owned transit company.

By holding that the duty of fair representation arises under State Law for breach of contract, the Court of Special Appeals ignored the requirements of the U.S. Constitution and in particular Article 6, Clause 2, which holds that the laws,

constitutions and judges of every State are bound by the "Supreme Law of the Land". The duty of fair representation developed as a mechanism to enforce the collective bargaining rights of union members. "(T)he duty of fair representation has stood as a bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law", Vaca v. Sipes, 87 S.Ct. 903, 912 (1967). The federal labor law was passed pursuant to the Supremacy Clause of Article VI of the U.S. Constitution and since it arises under the U.S. Constitution these federal rights cannot be eroded by State action.

Moreover, the Court of Special Appeals of Maryland in denying that the duty of fair representation is a federally created right, established the basis for weakening petitioner's right of fair representation

when it said that petitioner only could pursue his cause of action against his union and not his employer.

The result of this limitation of the right of fair representation is an impermissible tampering by the State with union activities that were protected by federal legislation and the cases interpreting this legislation.

> "Since the right to engage in concerted activities is one which Congress believed employees should be free to exercise as a proper weapon in unionization and collective bargaining without hinderance by employers or the State, the rule is consistent with the suggestion that State laws may not be invoked to upset the balance of interests struck by Congress against employer, union, employees, and the general public."

Cox, Labor Law Preemption Revisited, 85 Harv. L. Rev. 1341.

Congress enacted the Urban Mass Transportation Act to direct federal funds to urban areas to improve their Urban Mass Transporta-

tion systems.

Section 13(c) of the Mass Transportation Act requires a local body applying for federal transit money in order to take over a formerly private company to "preserve rights, privileges, and benefits * * * under existing collective bargaining agreement * * * " (§13 (c)(1)); "continu(e) under existing bargaining rights" (§13(c)(2)); "protec(t) employees against a worsening of their (employment) position" (§ 13(c)(3)). The Maryland Act, as it must, repeats these rights. See Annotated Code of Maryland, Transportation Article 7-605, which reads, in part:

> "(a) Protection Under Urban Mass Transportation Act of 1964 - The rights, benefits and other employee protective conditions and remedies of Section 13(c) of the Federal Urban Mass Transportation Act of 1964 . . . apply to the operation by the administration."

Congress, by passage of Section 13(c) of the Urban Mass Transportation Act of 1964, preserved for the transit workers their collective bargaining rights which they had when they were employees working for a private corporation and amongst these collective bargaining rights was the right of fair representation.

Congress was acting totally within its power constitutionally assigned to it to impose the conditions in Section 13(c). Congress derived this power from the Supremacy Clause of the United States Constitution, Article VI, Clause 2, which states:

> "This Constitution and the Laws of the United States, which shall be made in pursuance thereof; and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land; and the Judges in every state shall be bound thereby; anything in the

Constitution or laws of
any state to the contrary
notwithstanding".

The central theme surrounding the addition of Section 13(c) was that before a public take-over of private transportation company could occur, the state or local entity would be bound to the status quo of federal relations, or, in other words, the full panoply of collective bargaining rights that existed prior to the take-over and, of course, would include fair representation In fact, Congress had no alternative, but to maintain the status quo on labor relations. To do otherwise, would be to allow the State to diminish those rights accorded to the workers through federal laws, which were based upon the Supremacy Clause of the United States Constitution, Article VI, Clause 2

This Court clearly recognized the purpose of this amendement to the Urban Mass Trans-

poration Act of 1964 in its decision rendered in the Jackson Transit Authority v. Local Division 1285, Amalgamated Transit Union, AFL-CIO, CLC, 102 S.Ct. 2202, 2204 (1982).

> "The statute lists several protective steps that must be taken before a local government may receive federal aid; among these are the preservation of benefits under the existing collective bargaining agreements and the continuation of collective bargaining rights."
>
> "To prevent federal funds from being used to destroy the collective bargaining rights of organized workers. Congress included Section 13(c) in the Act". See H.R. Rep. Mo. 204, 88th Cong. 1st Ses., 15-16 (1963)

The Jackson case clearly holds that a local government's acceptance of federal funds under the Urban Mass Transportation Act precludes it from tampering in anyway with collective bargaining rights.

A similar situation was faced by This Court in the case of United Transporation Union v. Long Island R. Co., 102 S.Ct. 1349 (1982) where a railroad in New York State, formerly privately owned, was taken over by the State. After a strike ensued, the State attempted to enjoin the strike under the Taylor Law of New York which prohibits strikes by public employees. The Supreme Court held that "to allow individual states, by acquiring railroads, to circumvent the federal system of railroad collective bargaining or any other elements of federal regulation of railroads, would destroy the long-standing and comprehensive uniform scheme of federal regulation of railroads and their labor relations thought essential by Congress and would endance the efficient operation of the interstate rail system.

Moreover, a state acquiring a railroad does so knowing that the railroad is subject to such scheme of federal regulation". United Transportation Union v. Long Island R. Co., 102 S.Ct. 1349, 1351 (1982).

Also, in the case of State v. Taylor, 77 S.Ct. 1037 (1957), This Court held that those collective bargaining rights which were passed according to the Supremacy Clause could not be violated by state action.

> "In Railway Employees Department v. Hanson, 351 U.S. 225, 232, 76 S.Ct. 714, 718, 100 L.Ed. 1112, involving Section 2, Eleventh of the Railway Labor Act, which permits the negotiation of union-shop agreements notwithstanding any law of any State, we stated that 'A union agreement made pursuant to the Railway Labor Act has, therefore, the imprimatur of the federal law upon it and by force of the Supremacy Clause of Article VI of the Constitution, could not be made illegal nor vitiated by any provisions of a State', State of California v. Taylor, 77 S.Ct.

1037, 1042."

Both the United Transportation Union v. Long Island R. Co. and the State of California v. Taylor cases show This Court has consistently held that it will not tolerate erosion by the State of rights created by federal legislation passed pursuant to the Supremacy Clause of the U.S. Constitution.

Maryland has recognized the duty of fair representation for more than two (2) decades. Meola v. Bethlehem Steel Corp., et al., 246 Md. 226, 228 A.2d 254 (1967). The Court of Special Appeals of Maryland in its decision of Byrne v. The Mass Transit Administration, et al, recognized that This Court in Vaca v. Sipes, 87 S.Ct. 903 (1967), "held that State courts have jurisdiction entertaining a union member's action against the officers and representatives of the union based on the member's claim that the union

had, without good cause or reason, refused to take to arbitration the member's grievance against his employer". Byrne v. Mass Transit Administration, 473 A.2d 956, 959 (1984).

However, the Court of Special Appeals in its decision in Byrne v. Mass Transit Administration, et al., said that the Labor Management Relations Act of 1947 precluded "actions by employees against employers when there is a binding collective bargaining agreement in which the Union is to represent its members in labor disputes. Section 185 of LMRA does not, however, preclude suits by a union member against the union because of an alleged failure of the union's duty of fair representation, nor does it expressly permit such claims". Byrne v. Mass Transit Administration, 473 A.2d 956, 959 (1984).

By so holding, the Court of Special

Appeals again boldly ignored the rights created by the federal law which has consistently allowed employees to sue their employers as well as their union in fair representation actions. This Court has maintained that in fair representation cases it is appropriate to bring the action against both the employer and the Union and this position has been taken so that the employee may obtain an adequate remedy at law.

> "For these reasons, we think the wrongfully discharged employee may bring an action against his employer in the face of a defense based upon the failure to exhaust contractual remedies, provided the employee can prove that the union as a bargaining agent breached its duty of fair representation in its handling of the employee's grievance."

Vaca v. Sipes, 87 S.Ct. 903, 914 (1967).

> "As is the case where there has been a failure to exhaust, however, we cannot believe that Congress intended to foreclose the employee from his § 301

> remedy otherwise available against the employer if the contractual processes have been seriously flawed by the union's breach of its duty to represent employees honestly and in good faith and without invidious discrimination or arbitrary conduct."

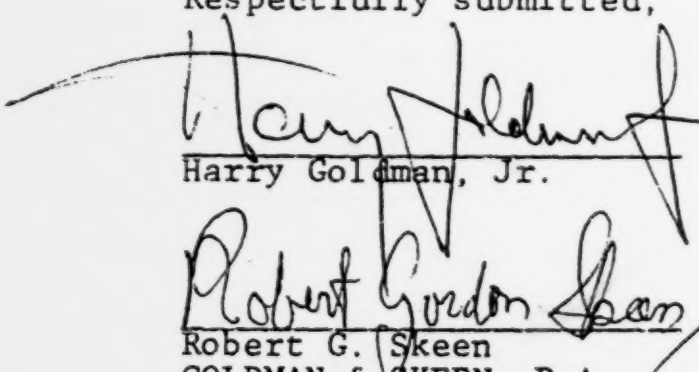
Hines v. Anchor Motor Freight, Inc., 96 S.Ct. 1048, 1059 (1976).

By restricting Petitioner's right to pursue his action against his Union only, the Court of Special Appeals of Maryland and the Court of Appeals of Maryland have impermissibly tampered with petitioner's right of the duty of fair representation that was accorded to him by the National Labors Relations Act and the Urban Mass Transportation Act of 1964 and This Court's cases interpreting these legislative enactments.

CONCLUSION

For all of the above reasons, the Petition for the Writ of Certiorari should be granted.

Respectfully submitted,



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SUPREME COURT OF THE UNITED STATES

No. D-464, October Term, 1984

RICHARD BYRNE,

Petitioner,

vs.

MASS TRANSIT ADMINISTRATION AND THE AMALGAMATED TRANSIT WORKERS' UNION, DIVISION 1300, AFL-CIO

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of Counsel for Petitioner, it is ORDERED, that the time for filing the Petition for Writ of Certiorari in the above-entitled cause be, and the same hereby is extended to and including February 11, 1985.

/s/ Warren E. Burger
Chief Justice of the
United States

Dated this 19th day
of December, 1984.

RICHARD BYRNE

v.

THE MASS TRANSIT ADMINISTRATION AND AMALGAMATED TRANSIT WORKERS UNION, DIVISION 1300, AFL-CIO

IN THE
COURT OF APPEALS
OF MARYLAND

Petition Docket
No. 234
September Term, 1984

(No. 916, September
Term, 1983
Court of Special
Appeals)

O R D E R

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals and the petition filed on behalf of Amalgamated Transit Workers Union, etc., and answers to both petitions filed thereto in the above-entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ Robert C. Murphy
Chief Judge

Date: September 14, 1984

84-1290

Office-Supreme Court, U.S.
FILED
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CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM,
1984

NO. D-464

****

RICHARD BYRNE,
PETITIONER

v.

THE MASS TRANSIT ADMINISTRATION
AND
AMALGAMATED TRANSIT WORKERS UNION,
DIVISION 1300, AFL-CIO

****

On Writ of Certiorari to the
COURT OF APPEALS OF MARYLAND

****

PETITION FOR A WRIT OF CERTIORARI

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SUPPLEMENTAL APPENDIX

JUDGE J. HAROLD GRADY
Sitting as Motions Judge

TITLE OF CASE: DATE OF RULING:
May 31, 1983

RICHARD BYRNE

v. APPEARANCES:

MASS TRANSIT ADM. Harry Goldman, Jr.

COURT: Circuit Court for Baltimore City

FOR PLAINTIFF

DOCKET: 1982 PAGE: 1432

Kenneth D. Pack
Carl Yaller

CASE NO.: 33331/82281822

FOR DEFENDANT

RULING BY THE COURT:

Motion of Mass Transit Administration Raising Preliminary Objection - GRANTED.

Motion of Mass Transit Administration for Summary Judgment in its favor - GRANTED.

Demurrer of Amalgamated Transit Workers Union, Division 1300, AFL-CIO to Declaration - SUSTAINED, without Leave to Amend.

The Court's rulings are for the reasons set forth in the above Motions and Demurrer and the authorities cited in memoranda in support thereof. J. Harold Grady, Judge

REPORTED
IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 916

September Term, 1983

RICHARD BYRNE

v.

MASS TRANSIT ADMINISTRATION
ET AL.

Gilbert, C.J.
Wilner
Garrity,

JJ.

Opinion by Gilbert, C.J.

Filed: April 12, 1984

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This appeal concerns a discharged employee, the employer that fired him, the union that represented him, and the ruling of the trial court that dismissed the employee's subsequent suit against both employer and union.

We shall uphold the trial court's ruling in part and reverse in part, remanding the matter for possible further proceedings.

Before we begin our discussion of the law applicable to the matter sub judice, we shall recount the facts out of which this litigation arose.

During a surveillance of the Main Shops of the Mass Transit Administration (MTA), that agency's police officers observed a person removing a box from the trunk of a MTA vehicle and placing it in a privately owned automobile. Viewing what they obviously suspected was a theft in progress, the officers confronted the suspect and

learned that he was Richard Byrne, an employee of MTA. Byrne denied involvement in the theft or knowledge of how the box got into his car. Examination of the box disclosed two batteries belonging to the MTA. Byrne was placed under arrest for theft of goods valued at less than $300.

When questioned two days later by Assistant Maintenance Superintendent Smith, Byrne responded that he had been road testing the MTA car because of its brake problems when he was approached by two men who offered to sell him two batteries. Company records revealed, however, that the MTA vehicle that Byrne had been testing was serviced for heater, and not brake, problems. Byrne said that after he purchased the two batteries, he transferred them to his personal automobile.

In conformance with the collective bargaining agreement between the MTA and the Amalgamated Transit Workers Union, Division 1300, AFL-CIO (the Union), Byrne and the Union, of which he was a member, were served with a formal disciplinary notice that contemplated Byrne's dismissal by MTA. Following a disciplinary hearing, Byrne was discharged. The Union, on behalf of Byrne, unavailingly appealed the discharge. Continuing in its defense of Byrne, the Union then filed a demand for arbitration. During the period between the initial determination of discharge and the appeal hearing, Byrne was judicially tried for the theft. The district court in Baltimore City dismissed the charges against Byrne on the basis of insufficient probable cause to effect

the arrest.[1]

At the arbitration hearing, MTA presented evidence, including testimony, concerning Byrne's actions leading to his discharge. The Union on behalf of Byrne raised two defenses, viz: (1) the MTA could not prove that any batteries were missing from its "stores", and, therefore, there was insufficient evidence of theft to justify Byrne's discharge; and (2) in the absence of a criminal conviction, the discharge should not be upheld. The arbitrator, however, was patently unpersuaded by the Union's argument, and he upheld the discharge.

Approximately one month later, Byrne filed identical suits in the Circuit Court for Baltimore City and in the United State's

[1] The correctness vel non of the district court's ruling is not before us, and we express no opinion thereon.

District Court for Maryland. The petitions asserting "jurisdiction pursuant to the provisions of Section 301 of the Labor Management Relations Act of 1947 (LMRA), 29 U.S.C. 185, et seq.," alleged that the discharge by the MTA was improper and that the Union had breached its duty of fair representation toward Byrne. The Union demurred and the MTA moved for summary judgment and also raised a preliminary objection to each petition. The United States District Court (Ramsey, J.) granted the motions because of a lack of federal subject matter jurisdiction.

The scene then shifted to the Circuit Court for Baltimore City where a hearing judge granted MTA's motions and entered summary judgment in its behalf. The Union's demurrer was sustained without leave to amend. Byrne now challenges those rulings.

There are at least three reasons why MTA's motion raising preliminary objection or, alternatively, summary judgment was properly granted by the Circuit Court. First, LMRA, 29 U.S.C. 185(a) provides:

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce ... or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."
> (Emphasis supplied.)

Manifestly, Byrne's suit was between him, his employer and his Union. Such an action simply does not fit within the pattern shaped by the statute. The Congress did not intend, in enacting Section 185, to permit employees to maintain an action against the employer whenever the Union allegedly failed to represent the employee in good faith. O'Sullivan v. Getty Oil

Company, 296 F.Supp. 272 (D. Mass. 1969); Miller v. Spector Freight Systems, Inc., 366 F.2d 92 (1st Cir. 1966); cf. Haynes v. United States Pipe & Foundry Company, 362 F.2d 414 (5th Cir. 1966).

Second, Section 152(2) of the LMRA defines an employer as

> "any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, ... or any State or political subdivision thereof ...." (Emphasis supplied.)

Indubitably, the MTA is an agency and instrumentality of the State of Maryland. See Md. Transp. Code Ann. Section 7-101 et seq.

Since Section 152(2) of the LMRA specifically excludes the State, and implicitly its agencies, from the purview of the Act, an action against MTA under claim of the authority of the LMRA will

not lie. See Jackson Transit Authority v. Local Division 1285, 457 U.S. 15, 102 S.Ct. 2202, 72 L.Ed.2d 639 (1982).

Third, the MTA is the only Maryland State agency that is by statute authorized to enter into collective bargaining agreements with its employees. Transp. Art. Section 7-601. The federal Urban Mass Transportation Act of 1964, 49 U.S.C. Section 1609, commands that a State or local government preserve collective bargaining rights of transit workers as a condition precedent to the receiving of federal financial assistance. Cognizant of the fiat of Section 1609 of the Urban Mass Transportation Act of 1964 (UMTA), the Maryland legislature in Transp. Art. Section 7-605 specifically provided that the "rights, benefits and other employee protective conditions and remedies of ... (Section 1609) of the federal ... (UMTA)"

apply to "transit facilities owned or controlled by" the MTA.

Transp. Art. Section 7-602 provides, inter alia, that "labor disputes" include "grievances that arise." Section 7-602(a)(3). In grievances, the decision of the arbitrator "is final and binding on all disputed matters." Section 7-602(d). The statute, as the Union points out in its brief, "is plainly worded and makes no exception in its finality mandate ...." Consequently, when the arbitrator upheld MTA's firing of Byrne, the matter under the LMRA and UMTA was at an end.

Thus, the Circuit Court correctly granted MTA's motion raising preliminary objection and entered summary judgment in favor of MTA.

What we have said with respect to MTA does not apply to the Union.

Byrne grounded his action in "Section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. 185 et seq." As we have previously seen, that section precludes actions by employees against employers when there is a binding collective bargaining agreement in which the Union is to represent its members in labor disputes. Section 185 of the LMRA does not, however, preclude suits by a union member against the union because of an alleged failure of the union's duty of fair representation, nor does it expressly permit such claims.

The Supreme Court in Vaca v. Sipes, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967), held that State courts have jurisdiction to entertain a union member's action against the officers and representatives of the union based on the member's claim that the union had, without good cause or reason, refused to take to arbitration the member's grievance against his employer.

The duty of fair representation does not arise under the LMRA, but rather as a private cause of action under State law for breach of contract. Dimeco v. Fisher, 185 F.Supp. 213 (D.C. N.J. 1960); Plant v. Catalytic Construction Company, 287 A.2d 682 (Del. Super. 1972); Corso v. Local Union No. 153 of International Union, United Auto, Aerospace and Agricultural Implement Workers of America, AFL-CIO, 123 N.J. Super. 121, 301 A.2d 773 (1973); DiMola v. Local Union 808, Intern. Broth. of Teamsters, Chauffeurs and Warehousemen of America, 408 N.Y.S.2d 731, 95 Misc. 2d 910 (1978). Therefore, Byrne does have a right to assert an action in a State court despite the federal court's lack of jurisdiction.

It is one thing to bring the suit; it is another to prevail. Vaca makes clear that Byrne will have to prove that the Union breached its duty of fair representation.

The mere fact that the arbitration proceeding was decided adversely to Byrne does not lead to the conclusion that the Union failed to represent him fairly. There are cases, of which this might well be one, where no union representative, lawyer, magician or combination thereof could convince an arbitrator that the employer's action was improper.

Byrne shoulders the burden of proving that the Union acted in bad faith. Unions are not insurers of their member's job security. While the Union may be expected to provide service and assistance to its members, it cannot be expected to guarantee that, irrespective of the employee's misconduct, the employee will retain his job.

Aside from the question of the bringing of the suit is the knotty problem of determining "what remedies may be available

against the Union if a breach of duty is proven." Vaca v. Sipes, 386 U.S. at 188. We need not and do not here decide that issue.

Inasmuch as Byrne had a right to bring suit against the Union, although not under the statutory authority he asserted, the Circuit Court should not have precluded amendment of the declaration, but should have allowed Byrne to amend so as to place his claim under authority of State law. We so opine because the Court of Appeals in Crowe v. Houseworth, 272 Md. 481, 325 A.2d 592 (1974), made clear that "amendments (to pleadings) should be freely allowed ...." Subsequently, in Staub v. Staub, 31 Md. App. 478, 482, 356 A.2d 609 (1976), we said:

"Irrespective of what the procedural law may be in other jurisdictions, Maryland has adopted a liberal view relative to amendment. It is manifest that the Maryland Rule is designed to place a case on trial on its merits, thus fostering justice rather than impeding it by adhering to antiquated technicalities." (Footnote omitted.)

When we apply the Houseworth-Staub rationale to the case at bar, we are led to the conclusion that the Circuit Court erred in sustaining the demurrer without leave to amend. Byrne should be offered the opportunity to amend his declaration. Amendment, however, does not guarantee success, because, as we have previously said, the burden Byrne carries is tremendous.

JUDGMENT AFFIRMED AS TO THE MASS TRANSIT ADMINISTRATION.

JUDGMENT AFFIRMED IN PART AND REVERSED IN PART AS TO AMALGAMATED TRANSIT UNION DIVISION 1300 AFL-CIO

THREE FIFTHS OF THE COSTS TO BE PAID BY BYRNE AND TWO-FIFTHS TO BE PAID BY AMALGAMATED.

84-1290 (3)

No. D-464

Office - Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

RICHARD BYRNE,

Petitioner,

v.

THE MASS TRANSIT ADMINISTRATION
AND
AMALGAMATED TRANSIT WORKERS UNION
DIVISION 1300, AFL-CIO,

Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether The National Labor Relations Act Is Applicable To A Dispute Between A State Agency Employer And Its Public Employee?

II. Whether Section 13(c) Of The Urban Mass Transportation Act Of 1964, A Federal Funding Statute, Supersedes State Law And Confers A Federally Derived Right Of Fair Representation Enforceable Against A State Employer?

STATEMENT OF PARTIES TO THESE PROCEEDINGS

The Petitioner, Richard Byrne, an employee of the State of Maryland, was the Plaintiff, and Appellant below. The Mass Transit Administration, an agency of the State of Maryland, and Amalgamated Transit Workers Union, Division 1300, AFL-CIO, were the Defendants and Appellees below.

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No. D-464

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

RICHARD BYRNE,

Petitioner,

v.

THE MASS TRANSIT ADMINISTRATION

AND

AMALGAMATED TRANSIT WORKERS UNION DIVISION 1300, AFL-CIO,

Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

LOWER COURT OPINIONS

The ruling of the Memorandum and Order of Judge Norman P. Ramsey, of the United States District Court for the District of Maryland is unpublished and appears in the Appendix. The ruling of the Circuit Court Of Baltimore City of the State of Maryland is unpublished and appears in the Appendix. The Opinion of the Court of Special Appeals of Maryland appears at 58 Md. App. 501, 473 A.2d 956 (Md. App. 1984) as well as in Petitioner's Supplemental Appendix and the Order of the Court of

Appeals of Maryland denying Certiorari is found in the Appendix to the Petition For A Writ Of Certiorari.

STATEMENT OF THE CASE

The Petitioner, Richard Byrne ("Byrne"), was discharged by his state agency employer for theft of MTA property after exhaustion of MTA grievance hearings and a full evidentiary hearing before an Arbitrator, during which he was represented by Respondent Amalgamated Transit Workers Union, Division 1300, AFL-CIO ("Union") and its counsel, Bernard W. Rubenstein, Esq.

Byrne thereafter simultaneously filed two identical actions against the MTA and the Union, the first in the United States District Court for the District of Maryland and the other in the Circuit Court for Baltimore City. Both actions were expressly brought under the authority of the Labor Management Relations Act of 1947 ("LMRA"), 29 U.S.C. § 185, *et seq.* and grounded in an alleged breach of the duty of fair representation by the Union.

On November 23, 1982 Judge Norman P. Ramsey granted the Defendants' Motions to Dismiss. Judge Ramsey held that the LMRA particularly in light of Sec. 152 thereof could not apply because the coverage of the Act does not extend to the MTA, as a State Agency, or to its employees. (A copy of that opinion is appended, marked Exhibit "A"). Petitioner did not appeal.

Judge J. Harold Grady of the Circuit Court for Baltimore City subsequently granted MTA's Motions Raising Preliminary Objection and for Summary Judgment and sustained the Union's Demurrer to identical claims filed with that Court, again alleging jurisdiction under the federal LMRA.

The Court of Special Appeals affirmed the lower Court's decision as to the MTA, holding that: (1) the federal LMRA confers no coverage and therefore no jurisdiction over a state agency employer and its employees and (2) the decision of the Arbitrator was "final and binding" by MTA's enabling, authorizing statutory provision. Transp. Art. § 7-602(d). Petitioner Byrne has requested this Court to issue a *Writ of Certiorari* to review this component of the Court of Special Appeals Opinion. With respect to the Union, the Court of Special Appeals reversed and remanded with instructions that the Trial Court permit an amendment to allow Byrne to state a cause of action for breach of contract against the Union. The Court of Special Appeals recognized that a private cause of action for breach of the duty of fair representation can lie against the Union under state law, pursuant to a breach of contract theory.

The Petitioner then filed a Petition For Writ Of Certiorari in the Court of Appeals of Maryland on May 29, 1984. That Petition was denied by that Court September 14, 1984.

ARGUMENT

I.

REVIEW IS INAPPROPRIATE BECAUSE STATE AND LOCAL GOVERNMENT EMPLOYERS AND THEIR EMPLOYEES ARE EXEMPT FROM COVERAGE UNDER THE LABOR MANAGEMENT RELATIONS ACT.

The Petitioner maintains that the Court of Special Appeals of Maryland erred in holding that the duty of fair representation did not arise under the Federal LMRA in this action by a State employee against his State employer. *Byrne v. Mass Transit Administration*, 58 Md. App. 501, 473 A.2d 956 (1984) (hereinafter "*Byrne*"). In fact, the Court of Special Appeals and the United States

District Court correctly held that there could be no jurisdiction to maintain an action against the MTA under the LMRA because the express language of that Act precludes any claim by a state agency employee against his/her state government employer.

Section 152(2) of the LMRA (Wagner Act) expressly excludes from the definition of an "employer" "any wholly owned Government Corporation, . . . *or any State or political subdivision* thereof . . . ." (emphasis by Court) (p. 4). The MTA is clearly a State agency, Md. Transp. Code Ann. § 7-101 *et seq.* (1979); *MTA v. Household Finance Corp.*, 292 Md. 313, 314, 439 A.2d 1104, 1105 (1982); *Harden v. MTA*, 277 Md. 399, 354 A.2d 817 (1976); and therefore is not a covered employer. Moreover, public transit employers and employees are excluded from the provisions of the federal LMRA. *Crilly v. Southeastern Pennsylvania Transportation Auth.*, 529 F.2d 1355 (3rd Cir., 1976). *See also Ayres v. I.B.E.W.*, 666 F.2d 441 (9th Cir., 1982); *A.T.U. Div. 819 v. Byrne*, 568 F.2d 1025, 1029 (3rd Cir. 1977). Consequently, the Maryland court correctly held that "an action against the MTA under claim of the LMRA will not lie." 473 A.2d at 959.

This Court has already held that disputes between publicly owned municipal transit systems and their employees are not subject to the National Labor Relations Act.

> "Thus, Congress made it absolutely clear that it did not intend to create a body of federal law applicable to labor relations between local governmental entities and transit workers. Section 13(c) would not supersede state law, *it would leave intact the exclusion of local government employers from the National Labor Relations Act, and state courts would retain jurisdiction to determine the application of state policy to local government transit labor relations.*" (Emphasis supplied).

Jackson Transit Authority v. Local Division 1285, ATU, 457 U.S. 15, 27, 102 S. Ct. 2202, 2207 (1982) ("*Jackson*") (Blackmun, J. for unanimous Court). This Court recently reiterated this state and local exemption from the NLRA. See *Garcia v. San Antonio Metro. Transit Auth.*, Nos. 82-1913 and 82-1951 (Feb. 19, 1985) Slip Opinion at p. 24. *Abood v. Detroit Bd. of Education*, 431 U.S. 209, 223, 97 S. Ct. 1782 (1977).

The MTA is not an "employer" within the meaning of the LMRA. Therefor its workers cannot be "employees" as required for standing under the Act. Section 152(3) (the Wagner Act) expressly excludes from its coverage those workers employed by employers, like the MTA, not covered by the Act. 29 U.S.C. § 152(3) (1976).[1] Thus, Petitioner has no standing under the Act and the asserted underlying basis for Petitioner's claim, the LMRA, is not applicable.

Petitioner then asserts that in enacting the LMRA, Congress has conferred upon state and local employees federal rights arising under that Act which preempt state law under the Supremacy Clause of the United States Constitution. It must be self evident that by excluding public employers and employees from the federal labor acts, Congress expressly declined to preempt state law. Therefore, the applicable state law must apply. As Chief Judge Gilbert of the Maryland Court of Special Appeals observed in his opinion in *Byrne*, the express statutory requirement of § 7-602(d) of the Maryland Transportation Article requires that the decision of the Arbitrator in grievances "is final and binding on all disputed matters." *Id.* at 959. The statute is clear, there are no exceptions. The Arbitrator, after full hearing, upheld the discharge. That decision, by statute, must be final and binding upon the parties except where an arbitrator exceeds his authority.

[1] Inexplicably Petitioner relies upon the Wagner Act in support of his preemption theory.

Thus, the applicability of the LMRA to this dispute between a state employer and its employee presents no novel issues of statutory construction requiring this Court's review and analysis. The express terms of the federal labor laws, and the applicable case law preclude any need for further consideration.

II.

SECTION 13(c), URBAN MASS TRANSPORTATION ACT DOES NOT APPLY.

Petitioner contends that the duty of fair representation has been preserved as a collective bargaining right, pursuant to Section 13(c) of the Urban Mass Transportation Act (UMTA) of 1964, 49 U.S.C. § 1601 et seq., a federal funding statute.

First, the duty of fair representation is not a collective bargaining right, and thus not within the purview of the asserted language of UMTA § 13(c). Second, such rights cannot invalidate, supersede or pre-empt State law. Relationships between local transit authorities and their unions are to be governed by State law and not the National Labor Relations Act. Finally, it was never intended that § 13(c) create a permanent set of specific collective bargaining conditions.

Even if § 13(c) does preserve collective bargaining rights, the duty of fair representation is not a collective bargaining right. Those rights are contractual, won by the union for the employees, in negotiations with the employer. The duty of fair representation is the union's statutory duty judicially implied from the NLRA. *Bowen v. United States Postal Service,* 459 U.S. 212, 103 S. Ct. 588, 604 (1983); C. Morris, *The Developing Labor Law,* "The Duty of Fair Representation, at 1285 (BNA, 1983)." Therefore, neither § 13(c) nor *Jackson* is relevant to this issue. Both address only with employer-union contract rights.

BEST AVAI

Even if the right of fair representation were a collective bargaining right, state law, not federal would control.

Petitioner maintains that federal labor law applies to disputes between these parties by means of § 13(c) and the Supremacy Clause of the United States Constitution, Article 6, Clause 2. According to Petitioner, Congress, through § 13(c) evidenced its intent to preempt the entire field of public urban mass transportation labor relations. Petitioner cannot assert Congressional preemption in the face of this Court's pronouncement in *Jackson*, at 457 U.S. at 23, 27, that "Section 13(c) evinces no congressional intent to upset the decision in the National Labor Relations Act to permit state law to govern the relationships between local governmental entities and the unions representing their employees," and that:

> "*Section 13(c) would not supersede state law*, it would leave intact the exclusion of local government employers from the National Labor Relations Act and state courts would retain jurisdiction to determine the application of state policy to local government transit labor relations." (Emphasis supplied).

In *Crilly, supra*, the Court of Appeals for the Third Circuit squarely held that Congress did not intend to preempt the labor relations between that public transit authority and its union.

Petitioner further asserts that under the Supremacy Clause, those rights arising under UMTA § 13(c) "cannot be vitiated by State action." This Court disagreed. "Section 13(c) would not supersede state law. . . ." *Jackson*, 457 U.S. at 27; *Local Division 589, ATU v. Massachusetts*, 666 F.2d 618, 633 (1st Cir. 1981), *cert. denied*, 102 S. Ct. 2928 ("*§ 13(c)*, . . . is not intended to lead to the invalidation of any state law.").

The First Circuit court also held that a state law, passed subsequent to UMTA § 13(c) collective bargaining as-

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surances, could take precedence over any particular § 13(c) assurance. *Id.* Therefore, the plain language of § 7-602(d) of the Transportation Article must prevail over any UMTA § 13(c) assurances.

Petitioner's position that § 13(c) guarantees all collective bargaining terms permanently also has been rejected. Congress intended only "limited," "provisional protections" to ease the "transitional effects" from the private to the public sector. *Id.*

Thus, Petitioner raises no new issues of statutory construction arising under § 13(c). This Court resolved all issues raised here with its opinion in *Jackson Transit Authority v. Local Division 1285, ATU, supra.*

CONCLUSION

For the foregoing reasons, the Mass Transit Administration respectfully requests that this Honorable Court deny Petitioner's Request For *Writ Of Certiorari.*

Respectfully submitted,

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APPENDIX

In The United States District Court
for the District of Maryland

Civil Action No. R-82-2990

Richard Byrne,

Plaintiff

v.

Mass Transit Administration
and
Amalgamated Transit Union

Defendants

MEMORANDUM AND ORDER

Plaintiff, Richard Byrne, a former employee of Mass Transit Administration (hereinafter cited as MTA) and a member of Amalgamated Transit Union, Division 1300 (hereinafter cited as Amalgamated), defendants herein, brings this action under the Labor Management Relations (Taft-Hartley) Act of 1947 § 301(a), 29 U.S.C. § 185(a) (1976) (hereinafter cited as the Act). In his complaint, plaintiff alleges that MTA's discharge of him on or about October 21, 1981, was without just cause, thereby violating the collective bargaining agreement then in effect between MTA and Amalgamated. Plaintiff also alleges that Amalgamated's conduct during the grievance proceedings concerning his discharge constituted material breaches of the duty of fair representation that Amalgamated owed him.

Presently pending before this Court are motions to dismiss filed by both defendants in the above-captioned action. In support of their motions, defendants argue that

this Court lacks subject matter jurisdiction over this proceeding under the Act, and that this Court should abstain from entertaining this suit in light of plaintiff's commencement of an identical action in state court. In his response to these motions, plaintiff admits that Congress exempted state instrumentalities from the coverage of the Act. Nonetheless, plaintiff argues that the conduct by defendants of which he complains presents a cognizable claim under the commerce clause of the United States Constitution or under the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* (1976). In addition plaintiff argues that if the Court finds it lacks jurisdiction over his complaint, the Court should dismiss the action without prejudice to his pending state court proceeding. Oral argument is unnecessary and the Court rules pursuant to Local Rule 6. For the following reasons, the Court grants defendants' motions to dismiss.

As a preliminary matter, plaintiff's invocation of this Court's jurisdiction pursuant to the commerce clause of the federal Constitution or to the Federal Arbitration Act is belated. A well-established tenet of federal jurisprudence holds that the subject matter jurisdiction of a federal court must be alleged on the face of the complaint and not in plaintiff's response to a motion to dismiss. *See, e.g., McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178 (1936); Fed. R. Civ. P. 8(a)(1). *See generally* Wright, Miller & Cooper, *Federal Practice & Procedure: Jurisdiction § 3522* (1975) and cases cited therein. Another time-honored principle holds that if the jurisdictional facts are challenged, the party claiming jurisdiction has the burden to demonstrate that the federal court has subject matter jurisdiction. *See, e.g., Thomson v. Gaskill*, 315 U.S. 442 (1942); Wright, Miller & Cooper, *supra* at § 3522, and cases cited therein. Accordingly, the Court will not address the alternative jurisdictional allegations con-

tained in plaintiff's response to defendants' motions to dismiss.[1]

Section 185 of the Act provides in pertinent part that this Court shall have jurisdiction over "[s]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations . . ." 29 U.S.C. § 185(a) (1976). Section 152 of the Act further provides that:

> "[t]he term 'employer' includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof. . . ."

Id. at § 152(2).

Although it does not appear that the Fourth Circuit has addressed the question of whether the Act applies to state employees, recent decisions in other jurisdictions that have construed section 152(2) have held that this section exempts state and local governments and their employees from the Act. In *Ayres v. IBEW*, 666 F.2d 441 (9th Cir. 1982), the Ninth Circuit held that, in the absence of clear Congressional intent to the contrary, "section 301(a) of the Act, 29 U.S.C. § 185(a), does not grant this court jurisdiction over the claims of an individual employed by a political subdivision of a state." *Id.* at 444. Similarly, the Third Circuit also concluded that public employees were excluded from the provisions of the Act after an in-depth examination of its plain language and accompanying legislative history. *See Crilly v. Southeastern Pennsylvania*

[1] Even though the Court need not consider the jurisdictional allegations contained in plaintiff's response, the Court notes parenthetically that plaintiff has failed to carry his burden of showing subject matter jurisdiction as required by *Thomson, supra.*

Transportation Authority, 529 F.2d 1355 (3d Cir. 1976) (seminal case construing § 152(2)). *See also Amalgamated Transit Union, Division 819 v. Byrne*, 568 F.2d 1025, 1029 (3rd Cir. 1977) (". . . the statutory definition of the term 'employer' specifies that it does not include 'any State or political subdivision thereof.' 29 U.S.C. § 152 (Supp. 1977). Thus, to the extent that New Jersey is here acting like a private purchaser of services, Congress has explicitly exempted it from the proscriptions of the NLRA."). In construing section 13(c) of the Urban Mass Transportation Act of 1964, the Supreme Court noted in dictum that section 152(2) excluded public employees from the operation of the Act:

> ". . . labor relations between local governments and their employees are the subject of a long standing statutory exemption from the National Labor Relations Act. 29 U.S.C. § 152(2). Section 13(c) evinces no congressional intent to upset the decision in the National Labor Relations Act to permit state law to govern the relationships between local governmental entities and the unions representing their employees."

Jackson Transit Authority v. Local Division 1285, ATU, 102 S. Ct. 2202, 2207 (1982). The Supreme Court's delineation of the scope of section 152(2) in *Jackson Transit Authority* is squarely consistent with the construction of that section as articulated in the above-mentioned decisions of circuit courts in other jurisdictions. Accordingly, this Court adopts this construction and holds that section 152(2) excludes state governments and their employees from the operation of the Act.

MTA, one of the defendants herein, is undisputably an agency and instrumentality of the State of Maryland. *See Md. Transp. Code Ann.* § 7-101 *et seq.* (1977); *Mass Transit Administration v. Household Finance Corp.*, 292 Md. 313, 439 A.2d 1104, 1105 (1982) ("MTA is a unit in

the Department of Transportation, a principal department of the State of Maryland."); *Harden v. Mass Transit Administration*, 277 Md. 399, 354 A.2d 817 (1976). Indeed, plaintiff alleges in his complaint that MTA ". . . is an agency of the State of Maryland . . ." Pursuant to the holdings of the above-mentioned authorities, MTA, as an agency of the State of Maryland, is not an "employer" within section 152(2), and, therefore, is not an "employer" within section 185(a) of the Act. *See, e.g., Ayres*, 666 F.2d at 444; *Crilly*, 529 F.2d at 1360-63. Absent any other basis for invoking this Court's jurisdiction, the Court lacks subject matter jurisdiction over the claim plaintiff asserts against MTA. Consequently, the motion to dismiss filed by MTA is hereby granted.

The dismissal of the action as to defendant MTA for the above-mentioned reasons also mandates the dismissal of the action against Amalgamated, the remaining defendant. A plain reading of sections 185(a) and 152 of the Act requires such a result under at least two alternative grounds. First, as stated earlier, there are only two circumstances under which this Court may entertain an action pursuant to section 185(a): a suit alleging a violation of a contract between an employer and a labor union, or between two labor unions. Neither circumstance is present in the instant proceeding. This action clearly does not involve a contract dispute between two unions. Absent the existence of an "employer" within the meaning of the Act to which section 185(a) applies, there is no contract dispute between an employer and union over which this Court can exercise its jurisdiction. Consequently, this Court lacks subject matter jurisdiction to consider plaintiff's claim against Amalgamted. Second, since MTA is not an "employer" within the meaning of the Act, its workers are not "employees" within the meaning of the Act. Section 152(3) specifically excludes from the application of the Act those workers who are employed by

employers that are not covered by the Act. 29 U.S.C. § 152(3) (1976) ("the term 'employee' shall include any employee . . . but shall not include . . . any individual employed . . . by any person who is not an employer as herein defined."). Consequently, Amalgamated is not "a labor organization representing *employees*" whose contract disputes with an employer fall within the application of the Act under the circumstances presented herein. *Id.* at § 185(a) (emphasis added). Absent a contract dispute involving a labor union whose members are employees covered by the Act, this Court lacks subject matter jurisdiction over the claim asserted by plaintiff against Amalgamated.[2] Accordingly, this Court is required to dismiss the action as to Amalgamated.

Because of the dismissal of the action for want of subject matter jurisdiction, defendants' alternative argument in support of dismissal, *i.e.*, abstention, has been rendered moot and the Court need not address it.

Notwithstanding the inapplicability of the Act to defendants herein, plaintiff's complaint nonetheless suggests the type of alleged grievance which otherwise would be traditionally actionable thereunder. In light of the above-mentioned federal caseload directing public employees to seek their remedies in state courts, the court grants defendants' motions to dismiss without prejudice to plaintiff's pending action in state court.

---

[2] The court in *Crilly* would have agreed with the foregoing analysis of the second basis warranting dismissal:

> It should also be noted that the definition of employee in § 2(3), of the Wagner Act, 29 U.S.C. § 152(3), is dependent upon the definition of employer. Thus, if SEPTA is not an employer for the purposes of the Act, the Local's members cannot be employees, and there is no federal jurisdiction over either the fair representation or the breach of contract claims.

Crilly, 529 F.2d at 1357 n.5.

For the reasons stated herein, it is this 23rd day of November, 1982, by the United States District Court for the District of Maryland,

ORDERED:

1. That defendants' motions to dismiss are GRANTED without prejudice to plaintiff's pending action in state court; and,

2. That the Clerk will mail copies of this Memorandum and Order to all counsel of record.

NORMAN P. RAMSEY,
United States District Judge.

In The United States District Court
for the District of Maryland

Civil Action No. R-82-2990

Richard Byrne,

Plaintiff

v.

Mass Transit Administration
and
Amalgamated Transit Union

Defendants

JUDGMENT

In accordance with the Memorandum and Order dated November 23rd, 1982, and filed in the above entitled case, it is

ORDERED and ADJUDGED:

That judgment is hereby entered in favor of the defendants and against the plaintiff.

NORMAN P. RAMSEY,
United States District Judge.